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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1022

WARREN ELDRETH GREEN, PETITIONER

v.

D. W. MCLAREN, MAJOR, U. S. ARMY, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 28–30) is reported in 123 F. (2d) 862.

JURISDICTION

The judgment of the circuit court of appeals was entered December 10, 1941 (R. 31). The petition for a writ of certiorari was filed March 7, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a member of the Onondaga Tribe of Indians is a citizen of the United States subject to military service under the Selective Training and Service Act of 1940.

STATUTES INVOLVED

The Act of June 2, 1924, 43 Stat. 253 (8 U. S. C., sec. 3), provided:

> all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

The Nationality Act of 1940, 54 Stat. 1138 (8 U. S. C., sec. 601), provides in part:

> SEC. 201. The following shall be nationals and citizens of the United States at birth:
>
> * * * * *
>
> (b) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

The Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. Appendix, sec. 303), provided in part:

> Except as otherwise provided in this Act, every male citizen of the United

States, and every male alien residing in the United States who has declared his intention to become such a citizen, between the ages of twenty-one and thirty-six at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States. * * *

STATEMENT

On May 14, 1941, in the District Court of the United States for the Northern District of New York, the mother of Warren Eldreth Green filed a petition for a writ of habeas corpus to obtain the release of her son from the custody of Major D. W. McLaren, United States Army, officer in charge of the induction station at Syracuse, New York (R. 3–6). The petition alleged that Green, a member of the Onondaga Nation of Indians, a resident of the Onondaga Indian Reservation, and a member of the Iroquois Nation of Indians (R. 3), had been selected for training and service and inducted into the United States Army by order of Local Board No. 474 of Syracuse, New York, under the Selective Training and Service Act (R. 4); and that Green's induction and further detention in custody was unlawful because Green is not a citizen of the United States, notwithstanding the Act of June 2, 1924 (*supra*), conferring citizenship upon all Indians born within the territorial limits of the United States (R. 4–5). The writ issued (R. 6–7), and the respondent filed

a return setting forth the facts of Green's registration, classification in I–A,[1] physical examination and induction, and alleging that Green was a citizen of the United States subject to the provisions of the Selective Training and Service Act (R. 7–9).

At the hearing it was stipulated that "none of the Six Nations ever asked that that law [Act of June 2, 1924] be enacted. None of the Six Nations were ever consulted. Their advice was never sought. It was Legislation put through by the Congress without any instigation upon the part of any of the Indians. It was an Act passed which all the Indians of this State [New York] in their organized capacity opposed. They have never consented to it. They have never accepted of its provision" (R. 16). It was further stipulated "that the Council of the Chiefs has the undisputed right as far as each Nation is concerned to determine its own dispute" (R. 19); and that the internal affairs of the Onondaga Nation are controlled by a body of eighteen or nineteen chiefs; that the Onondaga Tribe is one of the Six Nations; that the Confederacy of Six Nations is governed by a body of delegates from each of the Six Nations in affairs common to the Six Nations; and that the Onondaga Chief is appointed according to tribal custom and usage (R. 20).

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[1] "Class I–A; Available; fit for general military service." Selective Service Regulations, Vol. 3, p. 10 (Classification and Selection), prescribed by Executive Order No. 8560, Oct. 4, 1940.

The district court discharged the writ because it was unwilling to accept the Indians' claim of exemption in the absence of a favorable decision by an appellate court (R. 24). On appeal, the circuit court of appeals affirmed the order discharging the writ and held that Green was a "citizen" subject to the Selective Training and Service Act (R. 29–30).

ARGUMENT

The question here raised concerning petitioner's[2] citizenship status no longer presents a question of practical importance either to petitioner himself or to others of like situation who have not yet been inducted under the Selective Training and Service Act of 1940. The limitation of that Act to citizens (*supra*) has since been removed by an amendment which provides that (with certain exceptions, not herein pertinent) "every male citizen * * * *and every other male person residing in the United States* * * * shall be liable for training and service in the land or naval forces * * *" (Public Law 360, 77th Cong., approved December 20, 1941; italics supplied). Accordingly, the citizenship status of petitioner

[2] Although the petition for the writ of habeas corpus was filed by Rosetta Green on behalf of her son, Warren Eldreth Green, the petition for a writ of certiorari was signed by Warren Eldreth Green in proper person, and he will be referred to hereinafter as "petitioner." It is stated (Pet. 11) that "There have been no changes in attorneys or parties in this proceeding, except petitioner is appearing on the application in person."

and other members of the Onondaga Tribe of Indians is now irrelevant under the Act.

But in any event, the decision of the court below is correct. Petitioner contends that the treaties of 1784,[3] 1789,[4] and 1794[5] preclude petitioner's induction into the armed forces under the Selective Training and Service Act of 1940 (Pet. 2, 22–23). But it is well settled that "an Act of Congress may supersede a prior treaty" whether the treaty is one with a foreign nation or with an Indian Tribe (*Cherokee Tobacco Case,* 11 Wall. 616, 621) and that a treaty "is subject to such acts as Congress may pass for its enforcement, modification, or repeal." *Head Money Cases,* 112 U. S. 580, 599; see also *Thomas* v. *Gay,* 169 U. S. 264, 271, and *Sanchez* v. *United States,* 216 U. S. 167, 176. Green's status, therefore, must be determined in the light of the terms of the statutes involved and it is clear that the 1924 and 1940 statutes unequivocally conferred citizenship upon him. As the circuit court of appeals held (R. 30), the provisions in the 1940 statute, preserving Green's right "to tribal or other property," merely "emphasized its [Congress'] intention to impose all other obligations of citizenship."

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[3] The treaty between the United States and the Six Nations, made at Fort Stanwix, October 22, 1784 (7 Stat. 15).

[4] The treaty between the United States and the Six Nations, made at Fort Harmar, January 9, 1789 (7 Stat. 33).

[5] The treaty between the United States and the Six Nations, made at Canandaigua, New York, November 11, 1794 (7 Stat. 44).

Moreover, "citizenship is not incompatible with tribal existence" (*United States* v. *Nice,* 241 U. S. 591, 598), and Green's interests in tribal or other property "are mere property rights and do not affect the [his] civil or political status." *Matter of Heff,* 197 U. S. 488, 508–509, overruled on other grounds, *United States* v. *Nice, supra.*

Relying upon *Elk* v. *Wilkins,* 112 U. S. 94, petitioner urges (Pet. 17–21) that the Act of June 2, 1924 and the Nationality Act of 1940 cannot constitutionally confer citizenship on him because, as an Onondaga Indian, he was not completely subject to the jurisdiction of the United States at the time of his birth. However, while that decision held that Indians did not acquire citizenship by virtue of the Fourteenth Amendment, the Court there expressly said that Indians could be naturalized "by or under some treaty or statute." 112 U. S. 94, 103.

Petitioner further contends (Pet. 17–18) that Congress was powerless to impose citizenship on the Onondagas because none of the Six Nations Indians requested or assented to such legislation, but, in fact, opposed it. This Court has recognized, however, that the New York tribal Indians are wards of the Federal Government (*Fellows* v. *Blacksmith et al,* 19 How. 366), as are all other Indian tribes within the United States (*Worcester* v. *Georgia,* 6 Pet. 515), and that "It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and as-

sume the responsibilities attaching to citizenship." *United States* v. *Rickert,* 188 U. S. 432, 445. See also *United States* v. *Kagama,* 118 U. S. 375, 384; *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 565; *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 312; and *United States* v. *Boylan,* 265 Fed. 165 (C. C. A. 2).[6]

CONCLUSION

The decision below is correct and there is no conflict of decisions nor any question of general importance. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1942.

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[6] Petitioner contends (Pet. 25–26) that he is not liable to induction because Indian reservations are not specifically mentioned in the quota provisions of the Act (50 U. S. C. Appendix, sec. 304 (b)). However, Section 3 (a) of the Act (50 U. S. C. Appendix, sec. 303 (a)) defines who is liable to induction, and Section 4 (b) merely declares that the quota for each State or Territory shall be based on the actual number of men within the State or Territory liable for service. While the Onondaga Indian Reservation is not a "State" nor a "Territory," petitioner admits that it is "located within the confines of the territorial boundaries of the State of New York" (Pet. 2), and residents of the reservation liable for training and service were clearly intended to be counted in determining the quota for New York State.

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